



Signed and Filed: January 2, 2013

A handwritten signature in dark ink, appearing to read "T. E. Carlson".

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 11-32999 TEC
)	
PAYMON GHAFOURI,)	Chapter 7
)	
)	
Debtor.)	
)	Adv. Proc. No. 11-3215 TEC
MICHAEL DURKIN and JOYCE DURKIN,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
PAYMON GHAFOURI,)	
)	
Defendant.)	

MEMORANDUM DECISION

The above-entitled action came to trial on June 7, 2012. Agustin R. Pina appeared for Plaintiffs. Jackson A. Morris, III appeared for Debtor. On December 17, 2012, I reviewed the evidence by re-reading all of the exhibits, and by listening to the recording of both the testimony introduced at trial and Debtor's testimony at the meeting of creditors. Upon due consideration, I issue the following memorandum decision, which shall constitute my findings of fact and conclusions of law.

1 Debtor filed a chapter 7 petition in this court on August 15,
2 2011. Plaintiffs filed a timely action seeking to deny Debtor's
3 discharge under section 727(a)(2) and (a)(4), alleging that Debtor
4 concealed assets and made false statements in his schedules and
5 statement of financial affairs.

6 This court has subject-matter jurisdiction over the present
7 action under 28 U.S.C. § 1334(b). This denial-of-discharge action
8 is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

9 To be the basis for denial of discharge, a failure to disclose
10 assets or a false statement in the schedules or statement of
11 financial affairs must relate to a fact material to the case and
12 must be done knowingly with the intent to defraud creditors. Retz
13 v. Samson (In re Retz), 606 F.3d 1189, 1197 (9th Cir. 2010). The
14 fact that a misstatement of fact is not likely to have a material
15 effect on creditors or the administration of the bankruptcy case is
16 relevant in determining whether a misstatement was made with intent
17 to defraud.

18 A. ALLEGED CONCEALMENT OF ASSETS

19 1. Real Property in Iran. Plaintiffs contend that Debtor
20 failed to schedule an interest he had in real property in Iran.
21 Debtor testified that he owned no such property. He testified that
22 his father had owned real property in Iran and that he could have
23 inherited an interest in that property, but that he renounced this
24 inheritance years before filing his chapter 7 petition. Plaintiffs
25 introduced no testimony rebutting Debtor's testimony or otherwise
26 showing that Debtor owned real property in Iran on the petition
27 date.

28 2. Watches. Plaintiffs contend that Debtor failed to

1 schedule two expensive watches that he owned: a Breitling and a
2 Rolex. Debtor testified that he pledged the watches to his brother
3 as security for repayment of a loan more than two years before the
4 petition date. Debtor also testified that the Breitling was not
5 genuine, that the Rolex was several years old, and that before the
6 petition date he surrendered all interest in the watches by
7 agreeing to allow his brother to sell the watches and apply any
8 proceeds to his debt. Plaintiffs introduced no evidence
9 contradicting Debtor's explanation. To the extent that the
10 surrender was a separate transfer made within two years of the
11 petition date, I find no evidence that Debtor failed to disclose
12 the surrender with intent to defraud creditors.

13 3. Commission Check. Debtor is a real estate agent doing
14 business through his wholly-owned corporation, Ghafouri Inc. (the
15 Corporation). Plaintiffs contend that Debtor attempted to defraud
16 the estate by concealing a \$17,000 commission check. Debtor
17 acknowledges that he did not list the check as an asset in his
18 schedules and that he waited until after the petition date to
19 deposit the check. Debtor testified that he did not deposit the
20 check until after the petition date to preserve it from Plaintiffs'
21 judgment lien. He also testified that the commission belonged to
22 the Corporation, that he deposited it into the Corporation's bank
23 account, and that he disclosed his ownership of the Corporation in
24 his schedules. Plaintiffs introduced no evidence to rebut Debtor's
25 testimony that the commission belonged to the Corporation. Debtor
26 explained his handling of the check in a forthright manner at the
27 meeting of creditors. I find that Debtor did not attempt to
28 defraud creditors with respect to this matter.

1 4. Valuation of Corporation. Plaintiffs contend that Debtor
2 undervalued the Corporation by scheduling it as having no value.
3 Debtor testified that although the Corporation had assets, its
4 liabilities exceeded those assets. Plaintiffs introduced no
5 evidence concerning the liabilities of the Corporation. Plaintiffs
6 have failed to carry their burden of proof on this issue.

7 5. Bank account. Plaintiffs contend that Debtor
8 intentionally failed to schedule a personal bank account at First
9 Republic Bank. Debtor testified that he had withdrawn all funds
10 from the account approximately two years before the petition date.
11 Plaintiffs introduced no evidence to controvert Debtor's testimony
12 or otherwise show that Debtor had any undisclosed bank accounts in
13 which he held any funds as of the petition date. On the basis of
14 the evidence before the court, I determine that Debtor did not fail
15 to list any bank account with the intent to defraud creditors.

16 B. FALSE OATHS RELATED TO SECTION 707(b)

17 Plaintiffs contend that Debtor made various misrepresentations
18 in the schedules, in the statement of financial affairs, and the
19 Form B22, for the purpose of concealing that his chapter 7 case was
20 subject to dismissal for "substantial abuse" under section 707(b).
21 Specifically, Plaintiffs contend that Debtor: (1) understated
22 rental income on Form B22; (2) failed to include as income on Form
23 B22 and Schedule I personal expenses paid by the Corporation; and
24 (3) claimed as an expense on Schedule J home mortgage payments that
25 he was not making.

26 The evidence does not support a finding that Debtor made any
27 of these alleged misstatements with the intent to deceive or
28 defraud his creditors.

1 1. Rental Income. Debtor showed gross monthly rental income
2 of \$3,250 and related monthly expenses of \$3,250 in Part II(4) of
3 Form B22. Plaintiffs introduced evidence that Debtor's actual
4 gross rental income was sometimes as much as \$7,300 per month.
5 Debtor testified that the debt service (\$6,900) and taxes (\$1,500)
6 together always exceeded the rents received on the property.
7 Plaintiffs did not rebut this testimony, and Debtor's testimony
8 regarding debt service was corroborated by the amount due on the
9 mortgages encumbering the property (\$1,830,000 as of the petition
10 date). Thus, Debtor's description of his rental income was correct
11 in the most fundamental respect - that he had no net rental income
12 after payment of debt service and operating expenses. That Debtor
13 was unable to make the mortgage payments on the rental property
14 does not make this representation fraudulent. It would have been
15 misleading for Debtor to represent that the property produced net
16 income, because Debtor could not expect to keep the property
17 without paying debt service. Part II(4) of Form B22, which
18 directed Debtor to deduct "ordinary and necessary business
19 expenses" related to the rental income, invited Debtor to treat the
20 mortgage and tax payments as he did.

21 2. Vehicle Expenses. Debtor acknowledged at trial that the
22 Corporation paid all expenses related to three vehicles, and that
23 he used these vehicles for personal transportation as well as for
24 Corporate business. Debtor did not show the value of personal use
25 of the vehicles as income on Form B22. While Debtor's use of
26 Corporate vehicles for personal transportation might constitute
27 income to him, I find that Debtor did not act with intent to
28 deceive or defraud creditors in failing to schedule that use as

1 income. First, the Corporation had a legitimate need to maintain
2 the vehicles. The Corporation was a real estate brokerage, and it
3 is customary for such businesses to maintain expensive vehicles.
4 Second, Plaintiffs made no effort to show that Defendant understood
5 that personal use of Corporate vehicles should be treated as
6 income. Third, it is doubtful that the value of Debtor's personal
7 use of the vehicles was material to the determination whether
8 Debtor's chapter 7 case was subject to dismissal for substantial
9 abuse. Debtor's income and expenses would be subject to review for
10 substantial abuse under Form B22 only if his income exceeded the
11 state median income. Debtor's reported income was below median
12 income by \$845 per month. This means that the value of Debtor's
13 personal use of Corporate vehicles would have to exceed \$845 per
14 month before it would cause Debtor to rise above median income and
15 require him to complete the remainder of Form B22.

16 3. Home Mortgage Payments. Debtor acknowledged at trial that
17 he was not making payments on the mortgage on his residence but
18 listed those mortgage payments as an expense on his Schedule J.¹
19 Debtor testified at trial that he listed the mortgage payment on
20 Schedule J because he considered it to be an obligation that he
21 owed, even if he was unable to pay that obligation. I find that
22 Debtor did not intend to deceive or defraud creditors in the manner
23 in which he depicted his housing expense. First, the mortgage
24 payment was in fact a valid legal obligation, and Plaintiffs did

26
27 ¹ Debtor did not list the mortgage payments on his residence
28 as an expense on his Form B22. Because his income was below the
state median income, he was not required to complete Parts IV - VII
of that form, where that expense would be listed.

1 not attempt to show that Debtor understood that it was improper for
2 him to list that obligation as an expense in Schedule J if he was
3 not actually making the payments. Second, it is doubtful that any
4 misstatement regarding the mortgage payment was material. If
5 Debtor were to abandon the residence, he would incur a significant
6 expense in renting a home for his family of five. His Schedule J
7 showed a monthly deficit of \$8,995. If the mortgage payment of
8 \$10,300 were replaced by a rental expense of \$1,305 or more, Debtor
9 would still have no disposable income with which to pay creditors.

10 4. Other Issues. Although Plaintiffs asserted in their trial
11 brief that Debtor overstated other expenses, Plaintiffs failed to
12 introduce evidence of those misstatements at trial.

13 This decision does not resolve all claims against all parties.
14 Debtor asserted a counterclaim seeking to have Plaintiffs' judgment
15 lien avoided under section 522(f) of the Bankruptcy Code on the
16 basis that the lien impairs Debtor's exemptions. That lien-
17 avoidance counterclaim does not arise from the same nucleus of
18 operative facts as Plaintiffs' denial-of-discharge claim. Neither
19 side offered any evidence at trial regarding the lien-avoidance
20 counterclaim. The court will direct the Clerk to enter judgment
21 immediately on the denial-of-discharge claim under Rule 54(b). The
22 court will set a status conference regarding the lien-avoidance
23 counterclaim.

24
25 CONCLUSION

26 Plaintiffs failed to show that Debtor concealed any asset or
27 made any misstatement of fact with intent to deceive or defraud his
28 creditors. Plaintiffs' objection to Debtor's discharge is

1 overruled.

2 ****END OF MEMORANDUM DECISION****

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MEMORANDUM DECISION

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